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No. 86-336

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KARL LINNAS,

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

Since the petition for writ of certiorari was filed in this case, the Court has granted a writ of certiorari in United States v. Kungys, No. 86-228. Both of these cases have been brought by the Justice Department's Office of Special Investigations (OSI) under the Holtzman amendment with the active cooperation of the Soviet Union. Both petitioners are emigres from Baltic nations forcibly seized by the Soviet Union. These two cases thus arise from the same general history, use the same statutes and procedures and involve the same and similar issues. To grant a writ of certiorari in this case and set it for argument with Kungys will provide a broader range of facts, law and issues for the resolution of the important issues meriting review which both cases present.

The government's brief in opposition to the petition of Karl Linnas steadfastly ignores the ways in which this case is unique and merits review, and instead persists in approaching the case as though it were an ordinary deportation matter.

This case is unique and must be distinguished from the ordinary deportation case for several reasons.

First and foremost, it is a death penalty case of first impression. The petition asserts and the government has not questioned that this is the first case to seek review in this Court from among those prosecuted by the Office of Special Investigations (OSI) which has resulted in an order of deportation to a country - here the Soviet Union - in which the petitioner faces immediate decreed death.

Second, the death sentence that was imposed upon petitioner in the Soviet Union was imposed in absentia with an

extraordinary lack of due process, in that, among other things, the results of the trial -- including petitioner's conviction and death sentence -- were announced in an official Soviet journal before the trial actually began.*

Third, this case, like many of OSI's cases, involves active cooperation between OSI and the Soviet Union for the shared purpose of effecting deportation to the Soviet Union. The cooperation has included the acceptance and use by OSI of evidence from Soviet sources to accomplish the denaturalization and deportation of persons like petitioner who are sought by the Soviet Union.

Fourth, the unreliability of this

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* The government has not disputed that the results of the trial were announced beforehand nor that the offending issue of the journal was subsequently revised and reissued to eliminate dates which showed that the article about the trial had been prepared before the trial began.

Soviet-source evidence -- which was OSI's only direct evidence of petitioner's alleged involvement in atrocities -- is a further factor which makes this case unique and distinguishes it from the ordinary deportation case.

The Soviet-source evidence of the kind used against Karl Linnas is inherently unreliable. There is simply no way of knowing whether the deposition testimony taken in Estonia and the documents selected by the Soviets ostensibly from their archives is contrived. All four deponents whose testimony was taken in Estonia were tendered by the Soviet Union under inherently coercive circumstances. All four claimed to have been witnesses against petitioner at his 1962 trial in absentia, but no transcript of their testimony at the trial was made available. All testified under the scrutiny of the Soviet procurator who

presided at the depositions. We have no way of knowing whether these deponents in Estonia are who they say they are. All of the crucial evidence from Soviet sources is suspect because cases involving war crime charges are treated as political matters in the Soviet Union. The Soviet judicial system is expected to produce results in such cases that serve Soviet political objectives.

In U.S. v. Kungys,* the district court refused to accept Soviet source depositions as proof of the direct involvement of Kungys in atrocities. The refusal hinged on the unreliability of the evidence and the active cooperation between OSI and the Soviets -- factors that apply with equal force to the present case. In the course of its extensive

* 571 F.Supp. 1104 (D.N.J. 1983), rev'd on other grounds, 793 F.2d 516 (3rd Cir. 1986), cert granted, November 7, 1986, No. 86-228.

analysis the Court stated, 571 F.Supp. at 1124-25, 1123, 1131-32:

> The Soviet system of justice is not such as to instill great confidence in the unverified fruits of an investigation of a case involving sensitive state issues.
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> * * *
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> The Soviet authorities are outside of the jurisdiction of the United States judicial system. Consequently it is impossible to provide the usual safeguards of trustworthiness of the evidence having its source in the Soviet Union. This becomes a matter of concern for two reasons. First, the Soviet authorities have a strong motive to ensure that the government succeeds in this case. Second, the Soviet criminal and judicial system is structured to tailor evidence and produce results which will further the important political ends of the Soviet state at the expense, if need be, of justice in a particular case.
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> * * *
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> The government elected to collaborate in the prosecution of this case with the Soviet Union, a totalitarian state. It has accepted the assistance of Soviet authorities, particularly the testimony of witnesses who had been interrogated by Soviet investigators and for whom statements had been obtained by those interrogators.
>
> Knowing the nature of the Soviet legal system, the government had an obli-

gation to make every effort to ensure that the testimony it received under the auspices of the Soviet authorities was not tainted by the known Soviet practices designed to obtain the desired results in a particular case even at the expense of the truth. If the government deputizes a totalitarian state to obtain for it evidence to be used in a United States court, the government must take whatever steps are necessary to ensure that the evidence was not coerced or otherwise tainted by improper pressures.

The government has not fulfilled its responsibilities in this regard in this case.

The proceedings in the Soviet Union were conducted by Soviet officials without anything approaching adequate opportunity for verification by Karl Linnas or OSI.* Assuming arguendo the bona fides of the Soviet proceedings, ambiguities in the testimony, including the inherently

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* The genuineness of the documents ostensibly selected by the Soviets from their archives is not free from doubt. For example, on Sunday, November 2, 1986, the Philadelphia Inquirer, published a cover magazine story about petitioner entitled: Is This Man A War Criminal? The article showed a picture of a government exhibit, an identification card al-

(footnote continues on next page)

coercive circumstances under which the deponents testified in Estonia in 1981 under the gaze of a Soviet procurator render their testimony that Karl Linnas was a war criminal questionable and legally insufficient.

The government attempts to meet these issues of reliability by arguing that the admissibility of the evidence was "fully litigated" and resolved against petitioner during his denaturalization proceeding, Opp. at 11. The problem with this argument is that reliability received little or no consideration in resolving

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* (continuing from previous page) legedly signed by Karl Linnas as chief of the Tartu concentration camp. Shortly after the article appeared, petitioner's counsel heard from a reader, who had been trained in typography in Germany in the 1930's, who gave four reasons based on his examination of the card as reproduced in the article, why he thought the card might not be authentic.

the issue of admissibility. The portion of the unreported opinion of the Court of Appeals the government cites in support of this argument, Pet. App. A59-60, gives no assurance whatsoever that issues of reliability were assessed adequately, if at all, by the Court which stated:

> Finally, appellant challenges the admissibility of various foreign depositions. These contentions must also be rejected. Judge Mishler did not abuse his discretion in rejecting appellant's motions to depose Soviet officials and to have depositions taken outside the Soviet Union. Nor did appellant demonstrate that he was so indigent that the government should bear his attorney's costs in attending the depositions. Hence, Judge Mishler did not abuse the wide discretion ordinarily accorded a trial judge in refusing to subsidize such expenses. Finally, any alleged procedural deficiencies in taking the deposition and any inconsistencies in the deponents' testimony went to the weight rather than the admissibility of the evidence. Judge Mishler adequately took these factors into account in reaching his decision.

In reviewing the issue of the admissibility of these depositions the Second Circuit thus applied civil standards and relied on the broad discre-

tion a district court has in a civil case. It ignored the practical truth that a life was at stake. It did not purport to address questions of unreliability on the merits, but said they merely went to the weight to be accorded the testimony, an approach that is clearly insufficient when a death penalty has been assessed. At a minimum, the government should have been required to pay counsel's way to Estonia to participate in the depositions there, and the depositions should not have been permitted to proceed in the absence of petitioner's counsel.*

The government argues that petitioner's reliance on the district

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* The district court also gave scant attention to problems of reliability. In accepting the Soviet-source evidence the district court relied heavily on petitioner's inability to come up with any proof that any of the Soviet-source evidence was incredible or inauthentic in any respect, (footnote continues on next page)

court's rejection in Kungys of deposition testimony because of its unreliability is misplaced, because, the government says, the Court of Appeals in Kungys ruled that depositions taken in the Soviet Union are not per se inadmissible. Opp. n. 11 at 11. The government is wrong. The suggestion that was rejected by the Court of Appeals in Kungys was the "suggestion that all depositions taken in the Soviet Union should be automatically excluded

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* (continuing from previous page) terming unreliability a defense by innuendo (A74), but cf. Kungys, discounting defense inability to demonstrate falsity of Soviet-source documents or deposition testimony with the observation that no defendant in any such case has had the opportunity to investigate the circumstances under which the KBG and procurator prepared witnesses for interrogation by OSI, 571 F.Supp. at 1126. The district court also appeared to have somehow and inexplicably applied a theory of estoppel or waiver with respect to issues of reliability: "Having foresaken its right of cross-examination at the depositions taken in the Soviet Union the defense cannot now claim foul play." (A75).

from evidence." This does not vitiate the analysis of the district court in Kungys, which the Court of Appeals did not review. Indeed, the district court itself did not rule the depositions to be per se inadmissible. It accepted the depositions for the limited purpose of demonstrating that the atrocities at Kediania took place. The Court of Appeals did not reach the district court's treatment of the depositions or pass on the significance of either the specific irregularities or the general circumstances which the court deemed to undermine their reliability. The flaws in the Soviet-source evidence in Kungys largely mirror those present in the Soviet-source evidence in Linnas. In Kungys, where counsel was present and vigorously contested the depositions, the district court rejected them as proof of direct complicity in atrocities. In

Linnas counsel was not present, rendering the depositions even more unreliable because there was no on-the-scene contest of unfairness and no cross-examination, yet the depositions were accepted, with one important but limited qualification (n. 16 at A 75).

Conclusion

Petitioner Karl Linnas has not had a fair trial. He has had no real trial at all. The Soviet-source evidence which is the crux of the case OSI has presented against him an in an ostensibly civil denaturalization action and in deportation proceedings is notoriously unreliable. The Soviet trial of Karl Linnas in absentia in 1962 was utterly lacking in due process. The Soviet Union's continuing demands upon the United States for the extradition of Karl Linnas, spanning a period of more than 20 years,

are essentially political. The Soviet-source evidence OSI has accepted and employed against Karl Linnas has not been adequately tested, as it should be, in an American court. It has not been subjected, as it needs to be, to the crucible of American constitutional standards for determining the guilt of persons charged with criminal acts.

When these proceedings began in 1979 Karl Linnas had long been an American citizen entitled to a presumption of innocence and other protections of individual rights under the United States Constitution. He was stripped of his citizenship in a civil action bereft of the constitutional safeguards of a criminal trial, largely at the instigation of the Soviet Union and on the basis of evidence furnished or controlled by the Soviets. He was then treated as an alien

said to be entitled to no substantive due process and subjected to administrative deportation proceedings in which, in effect, he has been sentenced to death.

The American judicial system cannot, must not, allow this result to stand. The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

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